

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Game Show Network, LLC,
Complainant,
v.
Cablevision Systems Corp.,
Defendant
File No. CSR-8529-P

ORDER

Adopted: December 7, 2011

Released: December 7, 2011

By the Chief, Media Bureau:

I. INTRODUCTION

1. By this Order, we deny a Petition for Temporary Relief filed by Game Show Network, LLC ("GSN") asking the Commission to order Cablevision Systems Corporation ("Cablevision") to restore GSN to basic tier carriage while GSN's program carriage complaint against Cablevision is pending. As discussed below, we conclude that GSN has failed to satisfy its burden of demonstrating that interim relief is warranted.

II. BACKGROUND

2. GSN operates a cable network (called "GSN") which it characterizes as a "general interest network that features extensive female-oriented original programming (much, but not all of it, consisting of games of skill and chance and reality programs of various kinds), which typically accounts for more than 80% of its primetime schedule." Cablevision is the fifth-largest cable operator in the nation, serving over 3.3 million subscribers. Cablevision is also affiliated with several cable networks, including WE tv and Wedding Central.

3. On October 12, 2011, GSN filed a program carriage complaint alleging that Cablevision discriminated against GSN on the basis of affiliation, with the effect of unreasonably restraining GSN's ability to compete fairly, in violation of Section 616 of the Communications Act of 1934, as amended ("the Act"), and the Commission's program carriage rules. According to GSN, the complaint arises from Cablevision's decision to reposition GSN on February 1, 2011 from a basic tier to a premium sports tier, resulting in a loss of Cablevision subscribers for GSN.

1 See Game Show Network, LLC, Petition for Temporary Relief Pending Resolution of Program Carriage Complaint, File No. CSR-8529-P (filed Oct. 12, 2011) ("Petition").

2 See Game Show Network, LLC, Program Carriage Complaint, File No. CSR-8529-P (filed Oct. 12, 2011), at 7 ("Complaint").

3 See id. at 6 (citing Cablevision Systems Corporation, Form 10-K (Feb. 16, 2011), at 1, Ex. 10).

4 See Petition at 5-6; Complaint at 7-10, 17-21, 24.

5 See generally Complaint; see also 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

6 See Complaint at 2.

4. Along with its complaint, GSN filed a Petition for Temporary Relief asking the Commission to order Cablevision, during the pendency of GSN's complaint, to restore GSN to the basic tier carriage it was receiving on Cablevision's cable systems as of January 31, 2011.<sup>7</sup> Cablevision filed an Opposition to GSN's Petition for Temporary Relief, to which GSN filed a Reply.<sup>8</sup> GSN claims that it qualifies for interim relief under the traditional four-factor test.<sup>9</sup> In response, Cablevision notes that, because GSN has already been repositioned from the basic tier to a premium sports tier, GSN is seeking to change rather than to preserve the *status quo* and is thus required to "show[] that both the facts and law clearly favor grant of its request."<sup>10</sup>

5. With respect to the first factor (*i.e.*, whether the complainant is likely to prevail on the merits of its complaint), GSN argues that it is likely to succeed on the merits of its complaint because its complaint establishes that (i) GSN is similarly situated with two Cablevision-affiliated networks (WE tv and Wedding Central), because these networks (like GSN) are aimed at women viewers and generally compete with GSN for viewers, advertisers, and programmers;<sup>11</sup> (ii) Cablevision has treated GSN differently from these affiliated networks by carrying GSN on a premium sports tier while carrying WE tv and Wedding Central on a basic tier with substantially more subscribers;<sup>12</sup> and (iii) this discriminatory conduct has caused unreasonable harm to GSN's ability to compete fairly by reducing its viewership and thus its license and advertising revenues.<sup>13</sup> In addition, GSN alleges that there is direct evidence of discrimination because a Cablevision officer discussed the possibility of carriage of GSN on Cablevision's basic tier if GSN's part-owner, DIRECTV, would carry the Cablevision-affiliated Wedding Central.<sup>14</sup>

6. In response, Cablevision contends that GSN is not likely to succeed on the merits of its complaint.<sup>15</sup> As an initial matter, Cablevision claims that GSN's complaint is barred by the program carriage statute of limitations because it was not filed within one year from the date when the parties entered into a contract.<sup>16</sup> In addition, Cablevision argues that (i) GSN is not similarly situated with WE tv or Wedding Central because GSN (like many other networks) simply has a significant female audience, while WE tv and Wedding Central are specifically targeted to women;<sup>17</sup> (ii) Cablevision moved GSN to a premium sports tier in order to reduce costs and because GSN added little value to Cablevision's basic tier line-up, which Cablevision claims are legitimate and non-discriminatory reasons for its carriage decision;<sup>18</sup> and (iii) the repositioning of GSN to a premium sports tier on Cablevision's systems does not

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<sup>7</sup> See *Petition* at 1.

<sup>8</sup> See Cablevision Systems Corporation, Opposition to Petition for Temporary Relief, File No. CSR-8529-P (filed Nov. 2, 2011) ("*Cablevision Opposition*"); Game Show Network, LLC, Reply, File No. CSR-8529-P (filed Nov. 14, 2011) ("*Reply*").

<sup>9</sup> See *Petition* at 4 (citing *Time Warner Cable*, Order on Reconsideration, 21 FCC Rcd 9016, 9018-19, ¶ 9 (MB 2006)).

<sup>10</sup> *Cablevision Opposition* at 13-14.

<sup>11</sup> See *Petition* at 5-6; *Reply* at 5-13.

<sup>12</sup> See *Petition* at 6; *Reply* at 13-17.

<sup>13</sup> See *Petition* at 6-7; *Reply* at 18-19.

<sup>14</sup> See *Complaint* at 26-27.

<sup>15</sup> See *Cablevision Opposition* at 14-33.

<sup>16</sup> See *id.* at 14-16 (citing 47 C.F.R. § 76.1302(f)(3)).

<sup>17</sup> See *id.* at 17-21.

<sup>18</sup> See *id.* at 22-25.

unreasonably restrain GSN's ability to compete fairly because GSN is carried by many MVPDs nationally to a total of over 75 million subscribers, and the repositioning at issue here results in only a relatively small reduction in GSN's total licensing and advertising revenues.<sup>19</sup> With respect to GSN's claim that there is direct evidence of affiliation-based discrimination, Cablevision contends that the conversation between Cablevision and DIRECTV pertaining to DIRECTV's potential carriage of Cablevision-affiliated Wedding Central occurred after Cablevision notified GSN of its decision to reposition GSN to a premium sports tier, thus undermining any claim that this demonstrates affiliation-based discrimination.<sup>20</sup>

7. With respect to the second factor (*i.e.*, whether the complainant will suffer irreparable harm absent interim relief), GSN claims that it will suffer irreparable harm because Cablevision's repositioning of GSN has resulted in a substantial reduction in GSN's Cablevision subscribers.<sup>21</sup> GSN argues that this reduction in subscribers has resulted in and will continue to result in (i) lost licensing and advertising revenues; (ii) lost viewers, whom GSN may be unable to reacquire even if it is returned to a basic tier at the conclusion of the complaint proceeding; and (iii) harm to its reputation among advertisers and programming licensors as an established national brand.<sup>22</sup> In response, Cablevision notes that, to qualify for interim relief, GSN's alleged harms must be "certain and great; . . . actual and not theoretical" and "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm."<sup>23</sup> Cablevision contends that GSN's claims of irreparable harm are undercut by GSN's delay in seeking interim relief.<sup>24</sup> Moreover, to the extent that GSN alleges harm from lost revenues resulting from the repositioning, Cablevision states that "it is well established that monetary damages are not irreparable harm."<sup>25</sup>

8. With respect to the third factor (*i.e.*, whether grant of a stay will not substantially harm other interested parties), GSN notes that grant of interim relief would require Cablevision to pay GSN a license fee while the complaint is pending, but it claims that this will not substantially harm Cablevision because the fee (i) is commercially reasonable; (ii) has been paid by Cablevision for many years prior to the repositioning; and (iii) can be remedied at the end of the proceeding by applying any new terms as of the date of the repositioning.<sup>26</sup> Cablevision argues that it will suffer harm if GSN's requested relief is granted because it will be forced to redesign its service packages and expand its basic tier to include GSN, which will (i) result in lost revenue; (ii) require Cablevision to redesign its channel guides and marketing materials; (iii) force Cablevision to incur increased costs from training call center personnel about the channel addition; (iv) result in loss of goodwill among Cablevision subscribers, who disfavor channel disruptions; and (v) violate its rights under the First Amendment.<sup>27</sup>

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<sup>19</sup> See *id.* at 25-28. Cablevision also argues that grant of GSN's requested relief would violate Cablevision's First Amendment rights. See *id.* at 28-33.

<sup>20</sup> See *id.* at 23-24.

<sup>21</sup> See *Petition* at 7; *Reply* at 19-21.

<sup>22</sup> See *Petition* at 7; *Reply* at 19-21.

<sup>23</sup> See *Cablevision Opposition* at 34 (citations omitted).

<sup>24</sup> See *id.* at 33-34 ("If GSN were truly concerned about viewers changing viewing habits, it would have brought its claim in time to prevent that harm.").

<sup>25</sup> See *id.* at 34 ("[E]conomic loss does not, in and of itself, constitute irreparable harm . . . . Also, because competitive harm is merely a type of economic loss, revenues and customers lost to competition which can be regained through competition are not irreparable.") (quoting *KSWB, Inc.*, 13 FCC Rcd 21867, 21868, ¶ 3 (CSB 1998)).

<sup>26</sup> See *Petition* at 7-8.

<sup>27</sup> See *Cablevision Opposition* at 35-36.

9. With respect to the fourth factor (*i.e.*, whether the public interest favors grant of a stay), GSN contends that interim relief will serve the public interest by restoring GSN to many Cablevision subscribers and by protecting the public's interest in diversity and competition in the market for video programming.<sup>28</sup> Cablevision argues that the public interest would not be served by forcing Cablevision to carry GSN and thereby increasing the cost of its basic tier.<sup>29</sup>

### III. DISCUSSION

10. In evaluating a request for preliminary injunctive relief, the Commission and the courts generally consider the following four factors: (i) whether the complainant is likely to prevail on the merits of its complaint; (ii) whether the complainant will suffer irreparable harm absent a stay; (iii) whether grant of a stay will not substantially harm other interested parties; and (iv) whether the public interest favors grant of a stay.<sup>30</sup> As the moving party, GSN has the burden of proof in support of its request.<sup>31</sup> Applying the factors set forth above, we conclude that GSN has failed to satisfy its burden of demonstrating that interim relief is warranted.<sup>32</sup>

11. We find that the equitable factors favor denial of interim relief. With respect to the second and fourth factors (*i.e.*, whether the complainant will suffer irreparable harm absent a stay and whether the public interest favors grant of a stay), GSN argues that GSN and the public will continue to be harmed during the pendency of the complaint absent interim relief. We question the urgency of the

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<sup>28</sup> See *Petition* at 8-9; *Reply* at 22-23.

<sup>29</sup> See *Cablevision Opposition* at 36.

<sup>30</sup> See, e.g., *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); see also *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) (clarifying the standard set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*); *Hispanic Information and Telecomm. Network, Inc.*, 20 FCC Rcd 5471, 5480, ¶ 26 (2005).

<sup>31</sup> See *Amendment of Part 22 of the Commission's Rules*, Order, 8 FCC Rcd 5087, 5087, ¶ 2 (1993).

<sup>32</sup> While the Commission has adopted procedures for the filing of a request for a temporary standstill of an existing programming contract by a program carriage complainant seeking renewal of such a contract, those procedures contemplate that the petition would be filed and acted on before the existing contract expires, thus maintaining the *status quo*. See 47 C.F.R. § 76.1302(k) (not yet effective; awaiting approval from the Office of Management and Budget ("OMB") under the Paperwork Reduction Act ("PRA")); *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 26 FCC Rcd 11494, 11512-17, ¶¶ 25-30 (2011) ("*2011 Program Carriage Order*"). GSN's request for interim relief seeks to change the *status quo*, and thus would not be covered by Section 76.1302(k) even if it were in effect. See *2011 Program Carriage Order*, 26 FCC Rcd at 11515, ¶ 27 n.109 ("a program carriage standstill, if granted, will preserve the *status quo* by requiring continued carriage of a network that is being carried at the time the standstill is granted"). Nonetheless, the Commission has statutory authority to act on GSN's petition for interim relief pursuant to the authority granted to the Commission under Section 4(i) of the Act. See 47 U.S.C. § 154(i) (stating that the Commission "may perform any and all acts . . . and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions"); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 14508 (1998); *Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22566 ¶ 159 and n.464 (1997); *Time Warner Cable*, Order on Reconsideration, 21 FCC Rcd 9016 (MB 2006); *Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879 (MB 2010). The Media Bureau ("Bureau") has delegated authority to resolve a petition for interim relief under Sections 0.61 and 0.283 of the Commission's rules. See 47 C.F.R. §§ 0.61, 0.283. Because GSN's petition for interim relief would not be covered by Section 76.1302(k) even if it were in effect, we need not consider Cablevision's claim that we cannot act on a program carriage standstill request pursuant to Section 4(i) of the Act while OMB approval of Section 76.1302(k) under the PRA is pending. See *Cablevision Opposition* at 9-11.

relief requested and the irreparability of these alleged harms, however, given GSN's lengthy delay in pursuing interim relief. Although GSN was aware of Cablevision's plan to reposition GSN two months *before* the repositioning occurred,<sup>33</sup> it did not seek relief until almost nine months *after* the repositioning occurred.<sup>34</sup> Specifically, the challenged conduct occurred on February 1, 2011, when Cablevision repositioned GSN from a basic tier to a premium sports tier.<sup>35</sup> GSN waited until October 12, 2011 to ask the Commission to restore GSN to the basic tier carriage it was receiving on Cablevision's cable systems as of January 31, 2011.<sup>36</sup> GSN has failed to adequately explain the lengthy delay in seeking interim relief, principally relying on the fact that its complaint and petition were filed within the applicable statute of limitations, which requires a program carriage complaint to be filed within one year of one of the events listed in Section 76.1302(f) of the Commission's rules.<sup>37</sup> GSN states that it used this time to pursue negotiations with Cablevision to avoid litigation and to compile complete information about the nature of the discrimination and the harm it would cause.<sup>38</sup> The statute of limitations, however, provides the maximum period of time in which to file a complaint. Here, we are attempting to determine whether GSN will suffer irreparable harm absent a stay.

12. GSN's long delay in seeking equitable relief suggests that a stay is not necessary to prevent irreparable harm.<sup>39</sup> GSN claims that interim relief is necessary to prevent irreparable harm to its short-term and long-term viewership and competitiveness and that this harm will be difficult if not impossible to compensate through a damages remedy.<sup>40</sup> Notwithstanding these concerns, the delay of almost eleven months before GSN's filing causes us to question its claim of irreparable harm. Considering the amount of time GSN waited, we believe it to be more appropriate to allow the case to be decided on the merits rather than change the positions of the parties at an interim stage in the proceeding. Given the length of delay which has already occurred, the Bureau's final order is likely to be as effective as an order for interim relief. Based on this record, we find that the second factor (*i.e.*, whether the complainant will suffer irreparable harm absent a stay) weighs against a grant of interim relief. With respect to the fourth factor (*i.e.*, whether the public interest favors grant of a stay), GSN argues that grant of interim relief will serve the public interest by restoring GSN to many Cablevision subscribers,<sup>41</sup> while Cablevision counters that this restoration will increase the cost of its basic service tier, thereby leading to

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<sup>33</sup> GSN states that Cablevision notified GSN of its plan to reposition the network two months prior to the repositioning. *See Petition* at 3.

<sup>34</sup> *See id.* at 1.

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *See Petition* at 3-4; *Reply* at 25-28; *see also* 47 C.F.R. § 76.1302(f).

<sup>38</sup> *See Petition* at 3-4; *Reply* at 26-27.

<sup>39</sup> *See Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir.1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1092 n.27 (3rd Cir.1984) ("[T]he district court may legitimately think it suspicious that the party who asks to preserve the status quo through interim relief has allowed the status quo to change through unexplained delay."). Our decision on this issue, however, should not be read to state or imply that GSN will be unable to establish that the challenged conduct has "unreasonably restrain[ed] the ability of [GSN] to compete fairly" as required to demonstrate a violation of Section 616(a)(3) of the Act and Section 76.1301(c) of the Commission's rules. *See* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

<sup>40</sup> *See Petition* at 7; *Reply* at 19-21.

<sup>41</sup> *See Petition* at 8-9; *Reply* at 22-23.

a potential increase in rates to the detriment of its subscribers.<sup>42</sup> Based on the record here, we find that the fourth factor does not tilt sharply in favor of or against GSN's request for interim relief. Thus, on balance, we find that the equities do not favor grant of GSN's request for interim relief.

13. Because the equities favor denial of interim relief, GSN must satisfy a "heavy" burden under the first factor that it is likely to prevail on the merits of its complaint.<sup>43</sup> As discussed above, the record reflects numerous factual issues that must be resolved before GSN would be entitled to relief, each of which the parties contest, including, but not limited to, (i) whether repositioning of GSN to a premium sports tier on Cablevision's systems has unreasonably harmed GSN's ability to compete fairly; and (ii) whether Cablevision has legitimate and non-discriminatory business reasons for its carriage decision.<sup>44</sup> Based on the limited record before us at this early stage in the complaint proceeding, the first factor neither favors nor disfavors granting the relief requested. In sum, because the equities favor denial of interim relief, and GSN has not met its burden of demonstrating that it is likely to prevail on the merits of its complaint, we find that grant of the Petition for Temporary Relief is unwarranted.

#### IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i), 4(j), and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 536, and Sections 76.1300-1302 of the Commission's rules, 47 C.F.R. §§ 76.1300-1302, the Petition for Temporary Relief Pending Resolution of Program Carriage Complaint filed by Game Show Network, LLC **IS DENIED**.

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<sup>42</sup> See *Cablevision Opposition* at 36. We find no basis, however, to conclude that the third factor (*i.e.*, whether grant of a stay will not substantially harm other interested parties) weighs against a grant of interim relief. While Cablevision alleges that it will incur increased costs if interim relief is granted from revising channel guides and marketing materials, training call center personnel, and responding to consumer inquires, there is no basis in the record to conclude that these costs will result in "substantial harm" to Cablevision. See *id.* at 35-36; *Reply* at 22. We also question Cablevision's claim that a grant of interim relief will result in consumer disruption and an associated loss of goodwill by requiring Cablevision to "repackage its expanded basic tier to make room" for GSN. See *Cablevision Opposition* at 35-36. Cablevision does not allege that it will be forced to remove a network from its expanded basic tier to accommodate GSN. Moreover, GSN states that it has occupied the same channel position both before and after its repositioning and that restoring GSN to basic tier carriage "requires little more than a flick of a switch." *Reply* at 22. In addition, GSN notes that grant of interim relief would provide Cablevision's basic tier subscribers with an additional network which, assuming no associated increase in rates, would be a positive change from their perspective. See *Reply*, Supplemental Declaration of Timothy Brooks at 3; *but see Cablevision Opposition* at 22 (stating that "Cablevision's decision to reposition GSN was based on its determination that . . . moving GSN would assist in its efforts to reduce the costs of programming on the expanded basic tier, reducing upward pressure on subscriber rates").

<sup>43</sup> See *Columbia Communications*, Order on Reconsideration, 1986 WL 291539, ¶ 19 (Common Carrier Bur., 1986) ("Because the balance of equities militates strongly against [a stay], Columbia has a 'heavy' burden of demonstrating a substantial likelihood of success on the merits in order to justify a stay.") (quoting *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982)).

<sup>44</sup> See *supra* ¶¶ 5-6.

15. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief, Media Bureau